States Attorney General, 275 F.3d 1334 (11th Cir. 2001). The court of appeals in this case applied the same legal standard as those courts and its decision is in full accord with their rulings. See *Selami*, 423 F.3d at 624 (upholding finding of frivolousness based on the alien's submission of a fraudulent newspaper article intended to corroborate his testimony); *Efe*, 293 F.3d at 908 (frivolousness determination upheld based on the alien's having "gone back and forth with the facts and misrepresented his case several times," while failing to clarify his contradictory testimony); *Barreto-Claro*, 275 F.3d at 1339 (frivolousness determination based on a false statement in the alien's application, which he compounded with false testimony about how he came to the United States).

Petitioner's reliance (Pet. 6-7) on *Muhanna* v. *Gonzales*, 399 F.3d 582 (3d Cir. 2005), is misplaced. In that case, the Third Circuit reversed an immigration judge's determination of frivolousness that rested entirely on an inconsistency between the alien's testimony and asylum application. *Id.* at 586. The court stressed that a finding of frivolousness required more than a finding that the testimony was not credible, and required a full hearing on the applicant's underlying asylum claim. *Id.* at 588. The Third Circuit reversed because the immigration judge's truncation of the hearing following a preliminary determination that the alien was not credible precluded an assessment of whether the inconsistency was a "material element" of the asylum application. *Ibid.* The Third Circuit further found that the alien's explanation for the inconsistent testimony was plausible. *Ibid.* Here, by contrast, the court of appeals upheld the immigration judge's distinct finding, separate from his credibility ruling and after a full hearing, that the numerous

inconsistencies in petitioner's testimony were both deliberately fabricated and material. Pet. App. 2, 17-18, 20.

In the end, petitioner's argument for this Court's review rests not upon any new or different legal standard applied by the court of appeals, but upon petitioner's disagreement with that court's application of the law to the facts of her case. That record-bound question does not merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON MARIE IGOE
Attorneys

APRIL 2006

(2)

No. 05-852

FILED
APR 17 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

GURPREET KHURANA,

Petitioner,

v.

ALBERTO R. GONZALES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

MARC VAN DER HOUT
Counsel of Record
AVANTIKA SHASTRI
Attorney
VAN DER HOUT, BRIGAGLIANO & NIGHTINGALE, LLP
180 Sutter Street, Fifth Floor
San Francisco, CA 94104
(415) 981-3000

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF FOR PETITIONER

This Court should grant this petition for writ of certiorari to clearly establish the legal standards required for a finding that a noncitizen filed a "frivolous asylum application" pursuant to 8 U.S.C. § 1158(d)(6).

Contrary to Respondent's allegations, the Court clearly has jurisdiction over this petition. In addition, this petition presents compelling reasons warranting this Court's review, including raising an important question of federal law where there is an intra-Circuit conflict that has not yet been settled by this Court.

1. Respondent erroneously contends that this Court does not have jurisdiction over this petition because Petitioner failed to exhaust her administrative remedies. Brief in Opposition ("Br. in Opp.") 7. Respondent also erroneously contends that the Ninth Circuit Court of Appeals ("Ninth Circuit") improperly considered the "frivolous finding." *Id.*

As an initial matter, in support for this contention, Respondent relies on the Board of Immigration Appeals' ("Board") statement in footnote 1 of its decision to assert that Petitioner never exhausted her administrative remedies in appealing to the Board the immigration judge's conclusion that she filed a frivolous asylum application. App. 7 n.1. It is Respondent's assertion that the issue was waived before the Board, and therefore Respondent asserts that this Court is deprived of authority to review the matter. However, in its decision, the Ninth Circuit clearly considered the immigration judge's finding that Petitioner filed a frivolous asylum application, App. 2-3. The Ninth Circuit *only* had the authority to consider such

an issue if it had been properly before the Court. *See* 8 U.S.C. § 1252(d)(1). Because the Immigration and Nationality Act requires the exhaustion of all administrative remedies, the Ninth Circuit simply would not have addressed the issue if it had not been properly raised below. *Id.*

Respondent appears to assert that the Ninth Circuit erred in considering the immigration judge's finding that Petitioner filed a frivolous asylum application. Simply put, however, this Court must review the decision of the Ninth Circuit and not the decision of the Board. The Ninth Circuit clearly found that administrative remedies had been exhausted.

If, as Respondent alleges, the Ninth Circuit improperly reached the issue in the first place, then that error itself warrants this Court's review.

In addition, also contrary to Respondent's contentions, the Ninth Circuit correctly found that Petitioner exhausted her administrative remedies. The record shows that she challenged the frivolous asylum filing finding at every stage of her proceedings below. In her appeal before the Board, Petitioner asserted that "[the immigration judge] was wrong to state that she had filed a frivolous asylum application." Ninth Circuit Administrative Record ("A.R.") 31; *see also* A.R. 45 (contesting, in her notice of appeal to the Board, that the immigration judge "said that [she] had lied on her application."). Therefore, she fully exhausted her administrative remedies and this Court has jurisdiction over this petition.

2. Respondent also fails to understand the critical issue in this case, which is not a factual matter but a legal matter. Respondent contends that the Ninth Circuit's

decision contained a finding of deliberate fabrication because the Ninth Circuit stated that it found substantial evidence supporting the immigration judge's "frivolous finding." Br. in Opp. 7-8. The fact that the Ninth Circuit recited that it found deliberate fabrication is not enough to support a "frivolous finding" under 8 U.S.C. § 1158(d)(6). What Petitioner contests in this petition is whether the evidence was sufficient *as a matter of law* to show deliberate fabrication. Without sufficient evidence of intentional fabrication, the Court effectively made a "frivolous finding" without a showing of that required element under 8 U.S.C. § 1158(d)(6).

Under the regulations for 8 U.S.C. § 1158(d)(6), the judge must make a specific finding that a material element of an asylum application was "*deliberately* fabricated" before he or she can find that the asylum application is frivolous. *See* 8 C.F.R. §§ 208.20, 1208.20; *see also* 8 U.S.C. § 1158(d)(6) (requiring that the Attorney General determine whether "the alien has *knowingly* made a frivolous application for asylum").

The Ninth Circuit's decision never specifically identifies the evidence that it considered to be the basis for "deliberate fabrication.". Nothing in the Ninth Circuit decision demonstrates what evidence it considered in concluding that Petitioner intentionally or deliberately made misstatements to the Court. The Ninth Circuit affirmed the immigration judge's decision on the ground that Petitioner had adequate opportunity to explain the several alleged inconsistencies in the record that supported the immigration judge's finding that the asylum application was frivolous. App. 2. Yet the immigration judge's "frivolous finding" itself was based on only an

adverse credibility finding and nothing more. *See* App. 18 ("In the present case, the [Immigration] Court finds that the elements of respondent's claim discussed above which lead the Court to find that her application is incredible also is a proper basis for finding that respondent's application is frivolous."). A finding that the applicant is not credible is insufficient to meet the requirements of 8 U.S.C. § 1158(d)(6). There must also be a finding the applicant knowingly or deliberately fabricated material information in the application. The Ninth Circuit reached the first step, but never the second.

There was no evidence in the record that Petitioner knowingly or deliberately fabricated her asylum application, as opposed to just not being credible, that would support the immigration judge's decision or the Ninth Circuit's affirmance of that decision. As Petitioner demonstrated in her petition for writ of certiorari, the evidence suggests she made an innocent misstatement. *See* Petition for Writ of Certiorari ("Pet.") 12-13. She has also repeatedly sought to explain these inconsistencies to the immigration judge, the Board, and the Ninth Circuit during her hearing and in her briefs on appeal. *See e.g.*, App. 7, 15.

Even assuming *arguendo* that Petitioner failed to adequately explain the alleged inconsistencies, her failure in this regard is insufficient to constitute evidence of *deliberate fabrication*. The legal standard for adverse credibility findings already requires that the immigration judge give the applicant an adequate opportunity to explain any alleged inconsistencies before the judge may make an adverse credibility finding. In *Matter of S-A-*, 22 I. & N. Dec. 1328, 1331 (BIA 2000), the Board stated that

adverse credibility decisions would only be upheld where a review of the record reveals that (1) the discrepancies and omissions described by the immigration judge are actually present in the record; (2) such discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) the alien has failed to provide a convincing explanation for the discrepancies and omissions. *See also Matter of A-S-*, 21 I. & N. Dec. 1106, 1109 (BIA 1998).

The crucial difference between an adverse credibility finding and a "frivolous finding" is the additional showing of intent ("knowing" or "deliberate" fabrication) required for a "frivolous finding." Without pointing to additional evidence of an intent to deceive, the same evidence cannot be used to support the separate and additional element of deliberate fabrication for a "frivolous finding"; rather, a "frivolous finding" requires *more*. *See Muhanna v. Gonzales*, 399 F.3d 582, 588 (3d Cir. 2004) (reversing the immigration judge's "frivolous finding" not simply because of procedural irregularities during the hearing, but also because the inconsistencies in the petitioner's testimony did "not necessarily support a finding that the application was false, but rather tend[ed] only to show that [the petitioner] was not credible at one point during the hearing.").

To allow the Ninth Circuit to uphold the "frivolous finding" on this evidentiary record would improperly equate the two findings – adverse credibility and the "frivolous filing" of an asylum application – without requiring a higher burden of evidentiary proof to support the immensely harsh consequences of the latter finding.

See 8 U.S.C. § 1158(d)(6) (stating that an applicant for asylum who has filed a frivolous asylum application shall be permanently ineligible for any benefits under the Immigration and Nationality Act).

Thus, this Court must review this important federal question to determine whether the evidence in the record was *legally* sufficient to support a "frivolous finding" under 8 U.S.C. § 1158(d)(6) and 8 C.F.R. §§ 208.20, 1208.20.

3. Respondent also erroneously portrays this case as one that does not involve intra-Circuit conflict. Br. in Opp. 8-10. According to Respondent, the other Courts of Appeals have applied the same legal standard that was applied in the Ninth Circuit in this case. This analysis is incorrect given that the legal and evidentiary standards applied to find fabrication in the Third, Fifth, Sixth, Eighth, and Eleventh Circuits have been distinctively different than the standard applied in the Ninth Circuit for this case.

This case does not contain any of the evidence of *deliberate* or *intentional* fabrication that was present in those cases, such as: a recantation by the petitioner (*Barreto-Claro v. U.S. Attorney-General*, 275 F.3d 1334, 1338-39 (11th Cir. 2001), described at Pet. 11), the submission of fraudulent documents (*Selami v. Gonzales*, 423 F.3d 621, 626-27 (6th Cir. 2005), described at Pet. 11; *Fongwo v. Gonzales*, 430 F.3d 944, 947 (8th Cir. 2005) (upholding "frivolous finding" where petitioner had submitted fraudulent documents); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (finding that the petitioner had submitted fraudulent documents); *Sterkaj v. Gonzales*, 439 F.3d 273, 278-79 (6th Cir. 2006) (finding that the petitioner submitted a fabricated summons and "wanted" document)), or

contradictory testimony across different hearings (*Efe v. Ashcroft*, 293 F.3d 899, 908 (5th Cir. 2002), described at Pet. 10). *Cf. Alexandrov v. Gonzales*, ___ F.3d. ___, 2006 U.S. App. LEXIS 8055 (6th Cir. April 4, 2006) (vacated "frivolous finding" because submitted documents had not been shown to be fraudulent).

Instead, as in *Muhanna*, *supra*, this case contains only an adverse credibility finding without any evidence of *deliberate fabrication*. *See* Pet. 9-10. In *Muhanna*, the Third Circuit was clear that there are specific "factual findings mandated by [§ 1158(d)(6)'s] implementing regulation." 399 F.3d at 588. The Court was also clear that, "it is because of [the] severe consequences that the regulation requires more: a finding of deliberate fabrication of a 'material element' of an application, plus an opportunity for the alien to account for inconsistencies." *Id.* In contrast to five other Circuits, the Ninth Circuit has not required more evidence as a legal matter and has essentially conflated the credibility determination with the "frivolous finding" determination.

Thus, this Court should review this petition so as to resolve this intra-Circuit conflict, and to establish a clear and uniform legal standard that the Courts of Appeals must apply before making such a significant finding.

CONCLUSION

For the foregoing reasons, and for those in the petition, this petition for writ of certiorari should be granted.

Respectfully submitted,

MARC VAN DER HOUT
Counsel of Record
AVANTIKA SHASTRI
Attorney

April 17, 2006

REPLY BRIEF